mere malice, as the judge ruled, below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found, that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar and the one now before us, the position was unsound, and against principle and authority.

Judgment of the County Court reversed, and the cause remanded.

RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench.

REG. *vs.* MARIA CLARKE IN RE ALICIA RACE.[1]

An infant of the age of ten years was brought up on habeas corpus upon the application of the mother who was surviving parent, the father who was a marine, having died without appointing a guardian. The object of the mother, who was a Roman Catholic, was to remove the infant from a school under the Commissioners of the Royal Patriotic Fund, at which she had placed her in 1855, and to have her educated in a Roman Catholic school. *Held*, that the mother as guardian for nurture, was entitled to the custody of the person of the child; that the court could not examine the infant as to her wishes or religious belief; that the mother was not bound to educate her in the Protestant faith, nor had she lost her right over her by committing her to the care of the Commissioners of the Royal Patriotic Fund; and therefore the court was bound to order her to be delivered to her mother.

January 17.[2]—A writ of habeas corpus had been issued directed to Maria Clarke, the matron of the Sailor's Orphan Girl's School at Hampstead, to bring up the body of Alicia Race. The return by the matron stated that Alicia Race had been placed in the school by the Commissioners of the Royal Patriotic Fund; that she had not detained and did not detain her against her will, but that Alicia Race had continued with her, at her own desire.

[1] 21 Jurist, 335.

[2] Before Lord Campbell, C. J., Wightman and Crompton, JJ. Coleridge, J., was in the Court of Criminal Appeals.

Shee, Serjeant, moved that Alicia Race should be delivered to the mother.

O'Malley, contra.—The court will leave the child to choose for herself.

Bovill, for the Commissioners of the Patriotic Fund.—The court will not force the child to go to its mother.

It appeared that the mother, Alicia Race, was the widow of Lauman Race, late a Sergeant of Marines on board her Majesty's ship Pique, who was killed at the attack upon Petropaulovski, in September, 1854, and that she had by him two children, John, aged about twelve years, and the said Alicia, aged ten years and a-half. In July, 1855, she sent her daughter to the Sailor's Orphan Girl's School, which was under the control of the Commissioners of the Royal Patriotic Fund, and in which she would be maintained, clothed and educated, until she was fit for a situation, and then would be fitted out for it. The boy had been, with her concurrence, placed in the Sailor's Orphan Boy's School at Chardstock, in Dorsetshire, also supported out of the Patriotic Fund; but on the 25th October, 1856, she removed him, and was now desirous to remove her daughter from the Sailor's Orphan Girl's School, for the purpose of having her educated in a Roman Catholic School. The father was a member of the Church of England, and the mother a Roman Catholic; and during his lifetime she had with his consent, given their children such religious instruction as was in accordance with her own religious profession, and taught them to say Roman Catholic prayers; but the father attended the service of the Church of England, and during the time he was stationed at Chatham the children attended the regimental schools, which were conducted on Protestant principles; and they had been baptized by a clergyman of the Church of England. The father, by his will, dated the 24th August, 1854, after bequeathing all his property to his wife, directed that his Bible and papers should be sent to her; and the will concluded with the following clause:—"I do hereby nominate, constitute, and appoint my wife, Alicia Race, executor of this my will and testament, feeling confident that she will do justice to my dear

children as a wife and mother." On the next day he wrote the following letter to his wife:

"Her Majesty's ship Pique at Sea,
August 25, 1854.

"My dear wife and children:—I now sit down to write a few lines to you previous to going into action. When you receive this I shall be no more, as it will not be sent to you if I survive. I hope you are all quite well, as I am at the present time. My dears, I write to bid you an eternal farewell, if such is God's will that I am to be cut off; but I trust in Providence, and hope I may be spared to meet you again; but as we cannot all expect to survive to tell the tale, and I may be one that is doomed to die in defence of my Queen and country, therefore, my dear wife, it will be a consolation that I died in defence of liberty and done my best, as in duty bound by my oath when I took to the profession of arms. My dear Alicia, I have made my will to you, and I trust you will carry it out according to my wish. I wish, my dear, that you will remain a widow until the children are capable of taking care of themselves. I hope, my dear, that you will not disregard this my last wish, as I should not die happy if I thought a step-father would be over my babes; but I feel confident that you will not forget my last wish. My dear wife, I have not received a letter from you, or any one else, since I left England. I should feel very happy to hear from you before I am called into eternity; but the Lord's will be done. We must bow to His command. My dear Ally, I am but ill-prepared to meet my Maker face to face, but I trust he will have mercy upon my poor soul, and forgive me my transgressions, as I forgive all men that have done me any wrong, before I die. I have settled all my worldly affairs as well as I can. My dear wife, kiss my dear children for me, as a last embrace from a loving father, and tell them that his last thoughts were for them, and bring them up in the fear of the Lord. My dear wife, I think I see poor Alicia, by turns, for the loss of her poor old man, and then I see her rejoicing at his return; but, alas, such dreams! My dear, I have written a farewell letter to my mother, brothers, and sisters, and all friends and

relations, and I trust you will not be forgotten by them. My dearest wife, give my dying love to your mother and sister, and all your friends that may befriend you or my dear children. May we all meet in heaven, is the last prayer of one that you know how to prize, although he will be in eternity when you receive this last letter he ever wrote, as we are only waiting for the morning to dawn to go into Petropaulovski and commence the work of destruction. It is a Russian colony, and we are bound to take it, or die in the attempt. My dear wife and children, it is late, and I require some rest before I commence the work of carnage that to-morrow may bring forth. My dear, I have not set my foot on shore but twice since I left England, and then only for a few hours, on duty. The last from your affectionate, loving husband,

LAUMAN RACE."

The girl had expressed a strong disinclination, on religious grounds, to leave the Sailor's Orphan Girl's School, and the committee of the school had declined to compel her to leave and return to her mother.

Shee, Serjt., and *Finlason*, besides the cases mentioned in the judgment, cited *Mendes* vs. *Mendes*, 1 Ves. sen. 89; 3 Atk. 619; *Ex parte Hopkins*, 3 P. Wms. 152; Jervis, C. J., *in re Hakewill*, 12 C. B. 223, 230; Lord Cottenham in *Warde* vs. *Warde*, 2 Ph. 786; Forsyth on the Law of Infants, 72, citing *Rex* vs. *Isley*, 5 Ad. & El. 441; 6 Nev. & M. 730; Id. 76, citing *Rex* vs. *Soper*, 5 T. R. 278; M'Pherson on Infants, 135–141; 2 Stephen's Commentaries, 292, 2d ed.; *Rex* vs. *Ward*, 1 W. Bl. 386; and an *Anonymous case*, before Lord Eldon, cited in *Lyons* vs. *Blenkin*, 1 Jac. 254, note *b*.

O'Malley and *Lush* showed cause. They referred to stat. 12 Car. 2, c. 24, s. 9, which enables the father to appoint a testamentary guardian of his child under the age of twenty-one years; 4 Bac. Ab., "Guardian," F., citing *Lord Anglesey* vs. *Lord Ossory*, 3 Keb. 528; Id., "Infancy," A.; Id., "Habeas Corpus," B., 139; and Lord Mansfield in *Rex* vs. *Delaval*, 3 Burr. 1434, 1436.

Bovill, for the Commissioners of the Patriotic Fund, referred to *In re Arabella Frances North*, 11 Jur. 7, and stated the objections

which the commissioners felt to the removal of the child from the school, and contended that the child ought to be educated in the religion of its father, according to the rule which was followed in schools belonging to Chelsea and Greenwich Hospitals.

Shee, Serjt., in reply, cited *Hall* vs. *Hall*, 3 Atk. 721; and Littledale, J., in *Ex parte Glover*, 4 Dowl. 291.

Cur. adv. vult.

Lord CAMPBELL, C. J. now delivered the judgment of the court.

In this case we are to determine what directions ought to be given by the court respecting Alicia Race, an infant of the age of ten years and a few months, brought up under a writ of habeas corpus, granted at the instance of her mother. On the one side it is contended that we ought at once to order the child to be delivered to the mother; and on the other, that we should ask the child to make her election whether to go home with her mother, or to return to the school from which her mother wishes to remove her.

It is not disputed, that the father being dead without appointing a guardian, the mother is now guardian for nurture; and it is laid down in 3 Rep. 38 b., that guardianship for nurture continues till the child attains the age of fourteen years.[1] An observation was made that the commissioners of the school are in loco parentis; but this was little relied upon, and is wholly untenable. As a general rule, it is admitted that if a child under the age of seven years is so brought up, the court ought at once to order the child to be delivered to the guardian. But the contention is that between the ages of seven and fourteen the court ought to examine the child, and ascertain whether it has mental capacity to be competent to make a choice; and, according to the degree of mental capacity which it is found to possess, to hand it over to the guardian, or to liberate it, and to desire it to go where it pleases.

With regard to the maintenance of the poor, a rule has been introduced, that while a child is under seven it shall not be separated

[1] Br. Ab., "Garde," pl. 86, 101, 111, and Hale's P. C. 26, were also cited in argument.

from the mother for the purpose of being maintained by the parish in which it is settled. Again: by Serjeant Talfourd's Act, 2 and 3 Vict. c. 54, s. 1, it is enacted, that where infants under the age of seven years are in the sole custody or control of the father, the Lord Chancellor or the master of the Rolls may make an order that such infants shall be delivered to and remain in the custody of the mother until they attain the age of seven years.

Under seven is called the "age of nurture;" but this is the peculiar nurture required by a child from its mother, and is entirely different from guardianship for nurture, which belongs to the father in his lifetime, even from the birth of the child. We can find no distinction in the books as to the rights and incidents of this species of guardianship from the time when it commences till the time when it expires. One of these incidents is, that the guardian shall be entitled to the custody of the person of the child. Without such right he could not possibly perform the duties cast upon him as guardian. He is to nurture the child: the legal sense of this word is its natural and common sense in the English language, which Dr. Johnson says is, "to educate, to train, to bring up." Accordingly, from the case to be found in the Year Book, 8 Edw. 4, 7 b, to the present time, it has ever been considered that the father, or whosoever else on his death may be the guardian for nurture, has by law a right to the custody of the child, and shall maintain an action of trespass against a stranger who takes the child. See the authorities, Com. Dig., "Guardian," D.

The question then arises, whether a habeas corpus be the proper remedy for the guardian to recover the custody of the child of which he has been improperly deprived. Certainly, the great use of this writ—the boast of English jurisprudence—is to set at liberty any of the Queen's subjects unlawfully imprisoned; and when an adult is brought up under a habeas corpus, and found to be unlawfully imprisoned, he is to have his unfettered choice to go where he pleases. But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him the child is supposed to be set at liberty. *Rex* vs. *De Mandeville*,

5 East. 220, clearly proves that such is the fit mode of proceeding if the child is under seven. Is there any reason for following a different course between seven and fourteen? The intellectual faculties of the child may be considerably developed in this interval, and the child may now have a very strong inclination to leave the home of the guardian, and from religious as well as frivolous motives, to be educated at a different school from that which the guardian has selected. But the consequences which would follow from allowing such a choice, are most alarming. We must lay down a rule which will be generally beneficial, although it may operate harshly in particular instances. If the proposed choice were given to the child, the relation of guardian and ward would still subsist; the guardian might retake the child wherever he finds it, and he might maintain an action against the person who, contrary to his wishes, takes or detains the child. Then how could nurture be carried on with such a doctrine, which, if established, would apply to every father of a family in the kingdom, in respect of all his children, male and female, above the age of seven years? If a father wishes to take his son, when ten years old, from a private school where flogging is not practiced, and send him to Eton, and the boy refuses to come home, and is brought up by habeas corpus, is he to be permitted to say that on consideration, he is of opinion that the private school is preferable to any public school where flogging is permitted, and therefore he makes his choice to return to the private school, the master being willing to receive him? Or suppose that a Protestant mother, guardian for nurture of a daughter seven years of age, sends her to a boarding school professing to be a Protestant seminary; in a short time she finds that attempts have been successfully made by teachers there to convert the girl to the Roman Catholic faith; the girl refuses to come home, saying, in analogy to the language used by Alicia Race, "I will not go home to my own mother; I will stay here, where I may pray to the mother of God." She is in consequence, brought up by habeas corpus. Are we to examine her, and, finding her of quick parts, and professing to be a sincere convert to the Roman Catholic faith, to tell her, that in spite of the wishes of her mother, she is at liberty to return to the school where

she has been converted? Such a doctrine seems wholly inconsistent with parental authority, which both reason and revelation teach us to respect as essential for the welfare of the human race. Indeed, allusions were made during the argument at the bar to the workings of prevenient grace, and to the words of our Lord, "Suffer little children, and forbid them not, to come unto me, for of such is the kingdom of heaven." It must be enough merely to say, that the parental authority is in no degree weakened by such sacred doctrines or precepts; for it is impossible, without irreverence, to show how irrelevant they are. This suggests the extreme inconvenience which would arise from the proposed examination of the child. If there is to be an examination, it ought to be conducted before all the judges who are to take part in the adjudication; and, after testing her mental acumen, we ought to ascertain whether it is upon due investigation that she has imbibed a preference to Protestantism, and such an aversion to the Roman Catholic faith.

When we look into our law books, although we do not find the exact age defined within which the court, on a habeas corpus, will order the child to be delivered up to the parent or guardian without examination, we do find cases where this course has been adopted, the child being above seven years of age; and we find nothing to indicate that the rights of guardian for nurture are in any respect impaired during the period of guardianship. In *Rex* vs. *Johnson*, (1 Str. 579; 2 Ld. Raym. 1333; S. C.,.Mod. 214,) a female child, nine years old, was brought up by habeas corpus in the custody of her nurse, having a testamentary guardian appointed by the father. The court at first doubted whether they should go any further than to see that the child was not under any illegal restraint, but afterwards declared, that this being the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian, although she was very unwilling to be taken from Mrs. Johnson, her nurse, who was her near relation, and had cared for her very tenderly and disinterestedly. It was afterwards said, in 2 Str. 982, that Lord Raymond, who had been a party to this judgment, repented of what he had done; but in his own report of the case he throws no discredit upon it; and Lord Mansfield afterwards ex-

pressed strong approbation of the case, and said, that if Lord Raymond had changed his mind, his first judgment was clearly the right one. (*Rex* vs. *Delaval*, 1 W. Bl. 413). It is necessary to travel through the cases seriatim, as they are all reviewed in *Rex* vs. *Greenhill*, (4 Ad. & El. 624; 6 Nev. & M. 244), where the court laid down the rule, that where a young person under twenty-one years of age is brought before the court by habeas corpus, if he be of an age to exercise a choice, the court leaves the infant to elect where he will go; but if he be not of that age, the court must make an order for his being placed in the proper custody. Lord Denman, Littledale, Williams, and Coleridge, JJ., all make age the criterion, and not mental capacity, to be ascertained by examination. They certainly do not expressly specify the age, but they cannot refer to seven as the criterion, and there is no intervening age making the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the years of discretion.

When we attend to the authorities cited by the counsel for the commissioners, we find some vague dicta, and even some decisions, which at first sight give a color to the doctrine of examination and choice under fourteen, but which admit of an explanation entirely consistent with the claim of the guardian. In *Rex* vs. *Smith*, (2 Str. 982), *Rex* vs. *Johnson*, (1 Str. 579), is said to have been overruled, because a boy, who had not completed his fourteenth year, being brought up by habeas corpus, at the suit of the father, from the custody of an aunt, with whom he wished to live, was set at liberty, instead of being delivered up to his father, and was allowed to return to his aunt. But Lord Mansfield, in commenting upon this case, gives the true ratio decidendi upon which, and upon which alone, it can be supported—"That case was determined right, for the court was certainly right in refusing the infant to the father, of whose design in applying for the custody of his child they had a bad opinion." (*Rex* vs. *Delaval*, 3 Burr. 1437). There is an admitted qualification on the right of the father or guardian, if he be grossly immoral, or if he wishes to have the child for any unlawful purpose. The counsel for the commissioners relied much upon the

case of *Anne Lloyd*, (3 Man. & G. 547; 4 Scott's N. R. 200), where the mother of an illegitimate child, between eleven and twelve years of age, having obtained a habeas corpus directed to the putative father to bring it up, the court refused to order it to be delivered to the mother, and declared that it might use its own discretion; and the child being unwilling to go with the mother, the court would not allow the mother to take it by force. But Maule, J., there asked, (3 Man. & G. 548), "How does the mother of an illegitimate child differ from a stranger?" And although the relation of the mother to her illegitimate child is recognized for some purposes, it is clear that she has over it all the rights of guardian for nurture. From what was said by Lord Ellenborough in *Rex* vs. *Hopkins*, (7 East, 578), it would appear that it is only while an illegitimate child is under seven—an age during which the law of nature and the law of the land both say that the child, whether legitimate or illegitimate, ought not to be separated from the mother—that the court will interfere to protect the custody of the mother. In *Anne Lloyd's case* the child was considerably above that age. The only other decision much relied upon as to the right of the parent or guardian on a habeas corpus was *In re Preston*, (5 Dowl. & L. 233; 11 Jur. 1039), where a most distinguished judge refused to grant a writ of habeas corpus to bring up a legitimate child above the age of seven on the alleged application of the mother, who had become guardian for nurture, the father being dead. But the application was made under a power of attorney, the mother remaining in the East Indies, so that the child could not have been delivered to her. The real opinion of my Brother Patteson upon this subject we have fortunately an opportunity of knowing, from a note of Sir Erskine Perry, late Chief Justice of Bombay, in a very interesting collection of "Oriental Cases" decided and published by him. A Parsee family having detained an infant child from its father, a Parsee, on the ground that the father had embraced the Christian religion; on a habeas corpus the court had ordered the child to be given up to the father. In another case, the court, on habeas corpus, had ordered an Hindoo boy of twelve years of age, who professed to have embraced Christianity, to be delivered up to his father, who

adhered to the Hindoo religion, and the judges refused to examine the boy as to his capacity and knowledge of the Christian religion. In similar cases the Supreme Court at Calcutta had followed a different course. There being no appeal in such matters to a higher court, Sir Erskine Perry, for his subsequent guidance, very properly submitted the question to my Brother Patteson, whose reponse was as follows:—"I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of habeas corpus. The general law is clearly so, and even after the age of fourteen; whereas the boy was only twelve. The right might, indeed, be forfeited by misconduct of a very gross nature; but nothing of that kind appears to have been brought forward. It may have been an act of imprudence originally in the father to place his boys with persons who were likely to bring them up in religious opinions and faith contrary to their father. I suppose he made some stipulation for avoiding this; but whether he did or not, I do not think that the law would be affected thereby. Even if he had changed his mind on that subject, as well as on the education of his boys in other respects, I know of no law which forbids him to do so, or binds him to the arrangement which he had at first made." (Oriental Cases, 109).

For these reasons and on these authorities we are of opinion, in the present case, that primâ facie the mother is entitled, as guardian for nurture, to have her child delivered over to her. Still she may have forfeited her right by prior immoral conduct, or by proof that she does not make the application bonâ fide, or by having some illegal act in view when she has obtained possession of the child. According to the case of *Rex* vs. *Greenhill*, (4 Ad. & El. 624; 6 Nev. & M. 244), the immorality, to extinguish the right of the parent or guardian to the custody of the child, must be of a gross nature, so that the child would be in serious danger of contamination by living with him. But here no immorality whatever is imputed to Mrs. Race, and she seems to have been a virtuous woman, well deserving the ardent affection which her husband felt for her. An attempt is made to show, that in applying for this writ she is a mere tool in the hands of others. But, on carefully looking through the

affidavits, we do not see that this charge is at all substantiated, and we think that we are bound to give credit to what she swears as to the purity and sincerity of her motives. In wishing to take her two children from these Protestant schools she may act conscientiously, although not prudently; and when the boy was allowed to go, she might not unnaturally desire to have the girl also, that they might be educated together.

The answer to this application (if there be any) we think must rest upon the ground that the mother was under a legal obligation to educate her children in the Protestant faith, and that she now seeks to get possession of her daughter with the intention of following a course with her which the law forbids. Had she been a testamentary guardian, and the will had directed that the children should be educated as Protestants, we should not have ordered the girl to be delivered up to the guardian, she intending to send the girl to a Roman Catholic seminary. But she is guardian for nurture, with all the rights belonging to a mother as surviving parent. The husband certainly was a Protestant; his children had been baptized in the Anglican Church, and he probably expected that they would be brought up as Protestants, but his will is entirely silent upon this subject; and in his most beautiful and affecting letter of the 25th August, 1854, (showing him to have been the model of a Christian soldier), he appears to have had unbounded confidence in her, and to have left the education of the children entirely to her discretion. Indeed, by marrying a Roman Catholic, and by permitting the children in his lifetime to join in Roman Catholic prayers, he does not seem to have had the horror of Popery felt by many pious Protestants. Still, if the proposition laid down can be supported, that it was her duty, as guardian for nurture, from the simple fact of the father having been a Protestant, to educate the children as Protestants, she would be contemplating what the law forbids, by wishing to remove the children from a Protestant to a Roman Catholic school. But no sufficient authority has been cited in support of this proposition; and the mother becoming guardian by nature on the death of the father, no provision to the contrary being made by the will, she appears to us to have in all respects the same

parental authority which might have been exercised by the father had he survived the mother.

As the law stands, since the repeal of the statutes for persecuting Papists, the question must be the same, under the actual circumstances of this case, as if the father had died a Roman Catholic, and the mother surviving had been a Protestant. Would it in that case have been unlawful for the mother to have brought up the children as Protestants? The case of *Villareal* vs. *Mellish*, (2 Swanst. 533[1]) and *Talbot* vs. *The Earl of Shrewsbury*, (4 My. & C. 672), show that in such matters the courts know of no distinction between different religions, and will not interfere with the discretion of guardians as to the faith in which they educate their wards. The authority relied upon to show that the ward must invariably be educated in the religion of the father is *In re Arabella Frances North*, before Sir J. L. Knight Bruce, V. C., (11 Jur. 7). That case arising jointly on a return to a habeas corpus, and on a petition for the appointment of a guardian to children as wards of the Court of Chancery, it is difficult to distinguish what was done or said by the Vice-Chancellor as a common-law and as an equity judge. He cannot be alleged to have decided anything upon this point, and he had only to consider it with a view of determining whether the children should for a few days, till a guardian was appointed, be in the custody of a Roman Catholic or of a Protestant nurse. He certainly does draw an inference of fact, that the father died a Protestant, although for some time before his death he had conformed to the worship of the Roman Catholic Church, and, when dying, he would not permit the ministration of a Protestant clergyman; and his Honor does express an opinion, that although the wife had been formally admitted into the Roman Catholic Church, the children must be educated in the Protestant faith, the father having given no directions upon the subject by will. But this doctrine, if well founded, would only apply to the education of wards of the Court of Chancery, respecting whom an equity judge, representing the Queen as parens patriæ, has a very large discretion, and may give directions beyond the scope of the duties of a

[1]S. C., 2 Atk. 14.

guardian for nurture under the common law. Therefore, without venturing to question the dictum of so eminent a judge, (although it seems not altogether to accord with what was said by Lord Cottenham in *Talbot* vs. *The Earl of Shrewsbury*, 4 My. & C., 672), we do not think it enough to show that the mother of this infant, as guardian for nurture, was equally bound to educate the children as Prostestants, or that she can be charged with an illegal purpose when intending to send them to a Roman Catholic school.

The commissioners, in detaining this girl from her mother, have no doubt acted from the most laudable motives; but they are wrong in point of law in supposing that the mother, by committing the child to their care to be educated, has lost all right over her. In the case cited from the Year Books, (8 Edw. 4, 7 b), it was held, that "if a guardian, by reason of nurture, delivers the infant to another for instruction, he may afterwards retake the infant;" and this is vouched for good law by Comyns, C. B., in his Digest, tit. "Guardian," D. It might be every way much better for this child to remain in the school at Hampstead, which appears to be in all respects so admirably conducted, and we may individually deplore her removal from it; but upon this matter, as there is nothing contrary to law in contemplation, we have no jurisdiction to determine; and we think that we are bound, in the discharge of our judicial duty, to order that the infant Alicia Race be delivered up to her mother. We trust that she will ever be treated by her mother with the affection and tenderness anticipated by her father in the letter which he wrote when he foresaw that he was soon to fall in defence of his country.

O'Malley applied to the court that the judgment might not be immediately executed, upon an affidavit, which stated that on the 20th January a bill had been filed, at the instance of the committee of the Sailors' Orphan Girls' School, making Alicia Race a ward of Chancery; and that application would be made to Sir R. T. Kindersley, V. C., at the sitting of his court this day, for an injunction restraining the mother from interfering with the education of her daughter, and further proceeding under the writ of habeas corpus granted by this court, or from acting under any order made thereupon.

Lord CAMPBELL, C. J.—It is my opinion that the order of this court ought to be immediately executed. We have done our duty; the Vice-Chancellor will do his.

O'Malley stated that he was informed that an injunction had been granted.

Lord CAMPBELL, C. J.—We can take no notice of the injunction. The order of this court must be obeyed.—*Order accordingly.*[1]

In the Court of the Queen's Bench, January, 1857.

HUMFREY *vs.* DALE AND OTHERS.[2]

1. T. & M., brokers, employed by H. sold on his account to D., M. & Co., who were also brokers, ten tons of linseed oil. On the 14th of August, 1855, the following sold note was sent by T. & M. to H:—

"Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons of linseed oil, of merchantable quality, at, &c. (stating the terms.)

"THOMAS & MOORE, Brokers.

"Quarter per cent. brokerage to D., M. & Co., and a half to us."

On the same day the following bought note was sent by D., M. & Co. to T. & M:—

"Sold this day for Messrs. Thomas & Moore, to our principals, ten tons of linseed oil, of merchantable quality, at, &c. (stating the same terms.)

DALE, MORGAN & Co., Brokers.

"Quarter per cent. to D., M. & Co."

2. D., M. & Co. afterwards declined to accept the oil; and on the 28th of February, 1856, they informed H. of the name of their principal for whom they had purchased.

3. H. afterwards brought an action against D., M. & Co. for the price of the oil, and at the trial parol evidence was admitted of a usage of trade in the city of London, by which a broker making such a contract was held personally liable as purchaser, if he did not at the time of the contract disclose the name of his principal:—Held, first, that there was clear evidence of a contract of bargain and sale between the plaintiff as seller and the undisclosed principal of the defendants.

4. Secondly, that the evidence of the usage of trade, whether treated as explain-

[1] Sir R. T. Kindersley, V. C., subsequently, with the consent of the parties, heard the case in private, and delivered a judgment directing the education of the child in the religion of the father.

[2] 26 L. Jour. Rep. 137, Q. B.